IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA
(Wheeling Division)

CHARLES C. CUMPTAN, and DEBORAH V. CUMPTAN	*	
Plaintiffs,	*	
vs.	*	CIVIL ACTION NO.: 5:10-CV-012
ALLSTATE INSURANCE COMPANY and LARRY D. POYNTER, individually, and ED STEEN, individually	*	
Defendants.	*	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT ALLSTATE INSURANCE COMPANY'S AMENDED MOTION TO DISMISS

Now come the Plaintiffs, Charles C. Cumptan and Deborah V. Cumptan, by and through their counsel, and submit the following memorandum in opposition to Defendant Allstate Insurance Companyôs Amended Motion to Dismiss. For the reasons set forth herein, Plaintiffs respectfully request that the Amended Motion to Dismiss filed by Allstate Insurance Company [hereinafter ñAllstateò] be denied.

FACTUAL BACKGROUND

Allstate insured Charles C. Cumptan and Deborah V. Cumptan [hereinafter collectively ñthe Cumptansò] under a policy of insurance, being policy number 018153376, which provided underinsured motorist coverage benefits in the amount of $100,000.00 per person/$300,000.00 per occurrence on each of three vehicles. Complaint ¶10. Allstate and its claims adjusters/managers, including defendants Larry D. Poynter and Ed Steen [hereinafter collectively ñAdjuster defendantsò] were under an affirmative legal duty to disclose all possible underinsured motorist coverage available under the Cumptansô policy to compensate them for the severe and permanent injuries they suffered as a result of the negligence of an underinsured driver. *See e.g.* W. Va. Code §33-11-4(9)(n); 114 W.Va. C.S.R. 14-4.1. Instead, Allstate conspired with the Adjuster defendants to actively and fraudulently conceal the availability of stacked underinsured motorist coverage benefits to which the Cumptans were entitled in violation of West Virginia law. *See*, 114 W.Va. C.S.R. 14-4.2 (ñNo person may knowingly conceal from first-party claimants benefits, coverages or other provisions of any insurance policy or insurance contract when such benefits, coverages or other provisions are pertinent to a claim.ò). At the same time that Allstate and the Adjuster defendants were refusing to stack the Cumptansô policy limits, Allstate was seeking a premium rate increase by representing to the West Virginia Insurance Commissioner that it was actively paying such stacked claims because its policies did not contain legally sufficient anti-stacking language. Upon learning of Allstateôs deceit during the handling of his claim, the Cumptans promptly sought relief in the Circuit Court of Marshall County, West Virginia, a venue where similar claims were pending.

Allstate seeks to dismiss the Cumptansô claims primarily arguing that the Cumptansô claims are barred by the two dismissal rule and the applicable statutes of limitation. The basic premise of Allstateôs statute of limitations argument is that that the Cumptans ñshould have knownò their policy did not preclude the stacking of underinsured motorists limits at the time they agreed to accept Allstateôs $100,000.00 offer of the full available policy limits. Allstateôs argument in this regard ignores the critical fact that it was legally required to disclose *and not conceal* the full amount of underinsured motorist coverage available. Contrary to the suggestion implied in Allstateôs argument, the Cumptansô claims in this action arise not from the injuries they received at the hands of an underinsured tortfeasor, but from the discovery of Allstateôs illegal conduct in the handling of their claim for benefits. Moreover, Allstateøs arguments are particularly specious in light of the West Virginia Supreme Court of Appeals recent opinion in *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009), wherein the West Virginia Supreme Court of Appeals clarified West Virginia law on the tolling of statutes of limitation by application of the discovery rule and/or a defendantøs fraudulent concealment of a cause of action and the impact of civil conspiracy allegations. In syllabus point 5 of *Dunn*, the West Virginia Supreme Court of Appeals specifically held that questions of whether a statute of limitation has been tolled either by application of the discovery rule or the defendantøs fraudulent concealment of facts are generally ñquestions of material fact that will need to be resolved by the trier of fact.ò Thus, under the law of the State of West Virginia, Allstateøs motion to dismiss should be denied.

The Cumptans, instituted this civil action against the Adjuster defendants and Allstate in the Circuit Court of Marshall County, West Virginia, on or about January 11, 2010, after learning of the conspiracy carried out by Allstate and the Adjuster defendants to defraud Allstate policyholders of benefits to which they were legally entitled. *See*, Complaint, ¶¶ 1-5, 12, 14, 16, 18, 22-25. The Cumptans received serious and permanent injuries in a motor vehicle accident caused by an underinsured motorist, Melissa Cochenour, on May 27, 1988. Complaint ¶¶ 6-7. At that time, the Cumptans were insured under a policy of insurance issued by Allstate which provided $100,000.00 per person/$300,000.00 per occurrence underinsured motorist coverage benefits on each of three separate vehicles. Complaint ¶10. Despite knowledge that the three limits may be stacked, Allstate represented to the Cumptans that the total amount available under their policy to compensate their claims was $100,000.00, thereby fraudulently concealing the true policy benefits available to them. Complaint ¶¶ 12-15; Exhibit A to Complaint at BD-28 to BD-29, (ñexposure is $300,000.00 as 3 vehicles on policyò ñthere is $100,000.00 x # of veh. on policyò). Allstate made this representation despite its attempt to obtain a premium increase by informing (or misinforming as the case may be) the West Virginia Insurance Commissioner that its policies issued before December 16, 1991, as the Cumptansô was, did not contain legally sufficient anti-stacking claims and that it was actively paying such stacked claims. Complaint, ¶¶ 12-14. As a result of Allstateøs acts and representations aimed at concealing the Cumptansô ability to stack their underinsured motorist coverage benefits to satisfy their claim, the Cumptans ultimately accepted the non-stacked underinsured motorist policy limits of $100,000.00 as compensation for their injuries. Complaint ¶ 16.

In May 2009, the Cumptans learned of a conspiracy between Allstate and certain of its individual adjusters, including the Adjuster defendants, to deprive Allstate policyholders of their rightful policy benefits. This illegal scheme, the Cumptans learned, was uncovered in a lawsuit filed by Cindy Jo Falls in the Circuit Court of Marshall County, West Virginia, being Civil Action No. 00-C-200M, on September 25, 2000, against Allstate and defendant Larry Poynter. It was discovered in the *Falls* litigation that took the position internally that the language contained in its policies issued before December 16, 1991, was insufficient to preclude stacking of uninsured and underinsured motorist coverages. Despite their knowledge and affirmative duty to disclose that Allstateøs policy did not preclude stacking, Allstate and the Adjuster defendants actively represented to claimants, such as the Cumptans, that stacking was prohibited and actively sought to preclude stacking.

Upon learning of this illegal scheme, the Cumptans retained the counsel involved in the *Falls* litigation to pursue claims against Allstate and the Adjuster defendants on their behalf. The concerted efforts of Allstate and the Adjuster defendants to conceal their illegal conduct, fraud and misrepresentations are set forth in the Complaint. The Complaint specifically alleges that Allstate and the Adjuster defendants ñengaged in an intentional effort to concealò benefits, ñacted with specific knowledge and intent to defraudò, and willfully, knowingly and maliciously concealed benefits from the Cumptans and otherôs similarly situated in violation of West Virginia law. Complaint ¶¶ 22-24. Not only do the Cumptans seek recovery of the remaining policy benefits which were wrongfully denied them, but they seek both compensatory and punitive damages arising from the Allstateôs illegal and fraudulent conduct of which they first learned in May 2009. Upon being served with the Complaint, Allstate removed the Cumptansô claims to this Court and now seeks to dismiss the Cumptansô claims in their entirety on the basis of the ñtwo dismissalò rule and the applicable statute of limitations. Allstate also seeks to dismiss the Cumptansô unjust enrichment claims as failing as a matter of law.

STANDARD OF REVIEW

A Rule 12(b)(6) motion to dismiss should be granted only in ñvery limited circumstances.ò *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 325 (4th Cir. 1989). Dismissal is appropriate pursuant to Rule 12(b)(6) only if ñ óit appears to be a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proven in support of its claim.ô ò *Advanced Health-Care Services, Inc. v. Radford Community Hospital*, 910 F.2d 139, 143-144 (4th Cir. 1990) (quoting *Johnson v. Mueller*, 415 F.2d 354, 355 (4th Cir. 1969)). Thus, when reviewing a motion to dismiss, a court must ñaccept as true all well-pleaded allegations and must construe factual allegations in the light most favorable to the plaintiff.ò *Randall v. United States*, 30 F.3d 518 (4th Cir. 1994) (citation omitted).

ARGUMENT

I. THE "TWO-DISMISSAL RULE" DOES NOT BAR PLAINTIFFS' CLAIM

Allstateôs invocation of the ñTwo-Dismissal Ruleò demonstrates a fundamental misunderstanding of the claims asserted in the instant action and further misrepresents the premise of the ñfirst suitò upon which Allstate relies. As demonstrated by the complaint attached as Exhibit ñCò to Allstateôs Amended Motion to Dismiss, the ñcoverageò issue raised in the ñfirst suitò (the 1990 personal injury litigation) involved whether Allstate was entitled to an ñoffsetò for the monies paid in settlement by the tortfeasorôs insurer. The complaint in the 1990 litigation raises no issue regarding stacking of underinsured motorist coverages nor has Allstate demonstrated that the stacking issue was litigated in that action, much less the issue in this case of willful concealment of coverage in subjective bad faith. The previously missing page 5 of the 1990 complaint, which formed the basis this Courtôs grant of leave to Allstate to file their Amended Motion to Dismiss, demonstrates that the issue of ñstackingò was not raised in the prior action. In fact, the missing page 5 discusses only one $100,000 limit. As demonstrated by the dismissal order entered in the 1990 litigation also attached as a part of Exhibit C to Allstateôs Amended Motion, the claims asserted against Allstate in the 1990 litigation were settled and dismissed by agreement of the parties. As the Second Circuit Court of Appeals has held a dismissal ñknowingly consented to by all parties does not activate the ótwo dismissalô bar against bringing an action based on or including the same claim.ò *Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1018 (2nd Cir. 1976). If, as Allstate alleges, the 1990 litigation involved the ñsame claimò or was based upon the same claim as asserted herein, would Allstate not seek dismissal based upon the prior settlement of the claim? By failing to seek dismissal based upon an argument of accord and satisfaction by virtue of the settlement of the 1990 litigation, Allstate implicitly acknowledges that the claims asserted herein are not the same claims nor based upon the same claims asserted in the 1990 litigation. Under the Second Circuitôs holding in *Poloron*, an analysis of the ñtwo dismissal ruleò should not even be triggered because it is inapplicable on its face.

However, even if Allstateðs argument triggers an analysis under ñtwo dismissal ruleò, the ñtwo dismissal ruleò does not bar the instant action. Unlike the 1990 litigation, the current litigation does not seek a determination of unsettled issues of available coverage. The 2009 lawsuit filed in the Circuit Court of Marshall County, which was voluntarily dismissed, did not seek to resolve unsettled issues of coverage but sought relief for Allstateðs and the Adjuster Defendantðs illegal conduct and intentional deception. Likewise, the instant action does not seek to determine a coverage issue because the question of the available coverage has been admitted by Allstate and the Adjuster Defendants in internal documents which recognize that the Cumptans were entitled to stacked underinsured motorist coverage limits. The instant action seeks relief for Allstate and the Adjuster Defendantðs illegal conduct and intentional deception regarding the availability of stacked underinsured motorist coverage limits to satisfy the Cumptansô claims.

As noted by Allstate, the ñtwo-dismissal ruleò involves re-filing of the ñsame claim.ò *Manning v. South Carolina Dept. of Highway and Pub. Transp.*, 914 F.2d 44, 47 (4th Cir. 1990). Allstate maintains that the 1990 personal injury litigation asserts the ñsame claimò as the instant litigation. To accept this argument would require an extremely liberal factual interpretation of the claim asserted in 1990 (recovery for injuries sustained and a determination as to whether the policy permitted an ñoff-setò for amounts recovered from the tortfeasor) and the claims asserted herein (damages arising from defendantsô illegal conduct and fraudulent misrepresentations). Such liberal construction is contrary to the Courtðs standard of review for a Motion to Dismiss which requires all issues of fact and law to be resolved in plaintiffsô favor. *See, Randall v. United States*, 30 F.3d 518 (4th Cir. 1994). Simply put, the 1990 litigation involved questions of offset and the extent of the Cumptansô injuries. The Adjuster Defendants were not even involved in the 1990 litigation nor was their conduct at issue therein. The 2009 action filed in the Circuit Court of Marshall County involved issues identical to those presented in the instant lawsuit. The instant lawsuit involves claims of common law bad faith, violation of the West Virginia Unfair Trade Practices Act and attendant regulations, and fraudulent misrepresentations. The claims in the 2009 lawsuit and the instant litigation are not the same as nor based upon the allegations contained in the 1990 lawsuit. Accordingly, the ñtwo dismissal ruleò does not apply to preclude the instant action.

II. ALLSTATE'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE CUMPTANS' CLAIMS WERE TIMELY FILED UNDER WEST VIRGINIA LAW

Allstate primarily relies upon an argument that the Cumptansô claims are barred by the applicable statutes of limitation in support of its motion to dismiss. Although Allstate cites to *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009), for its recitation of syllabus point 4 of *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997), Allstateôs decision to ignore the remainder of the *Dunn* opinion is telling because to apply *Dunn* would result in the failure of its motion to dismiss. In *Dunn*, the West Virginia Supreme Court of Appeals clarified when statutes of limitation are tolled either through application of the discovery rule or a defendantôs misconduct in fraudulently concealing facts necessary for a plaintiff to discovery or pursue a cause of action. In either case, the West Virginia Court indicated the matter is generally not suited for summary resolution due to questions of material fact which must be resolved by the trier of fact. *Id.* at Syl. Pt. 5.

The *Dunn* Court set specifically set forth a five-step analysis to determine whether a cause of action is time-barred, holding that:

> A five-step analysis should be applied to determine whether a cause of action is time-barred. First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of

> action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.,* 199 W.Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.

Syl. pt. 5, *Dunn*. Application of this five step analysis demonstrates that a Rule 12(b)(6) dismissal of the Cumptansô claims on statute of limitation grounds would be inappropriate.

Step 1 - Determination of Applicable Statute of Limitation

The Cumptans do not dispute that a one year statute of limitation applies to their Unfair Trade Practices Act and common law bad faith claims nor do they dispute that a two-year statute of limitation applies to fraud claims. What the Cumptans do dispute is when those statutes of limitation began to run.

Step 2 – When did the requisite elements of the cause of action occur

Allstate focuses upon the date of the underlying automobile accident, May 27, 1988.[1] Allstate assumes and, in turn, wants this Court to assume, that all requisite elements must have occurred prior to the settlement of the Cumptansô claim for the ñnon-stackedò policy limits of $50,000.00. ñObviously,ò[2] according to Allstate, ñthis [ñthisò presumably meaning the occurrence of the requisite elements of each cause of action] would have happened well within the applicable one- and two-year limitations periods.ò Allstateôs Brief, pp. 5. When the requisite elements of each cause of action occurred is not ñobviouslyò as Allstate represents, particularly in light of the fact that each cause of action asserted by the Cumptans has, at its heart, Allstateôs concealment of their illegal conduct. The Court in *Dunn* recognized that this inquiry generally involves mixed questions of fact and law which require resolution of genuine issues of material fact by the trier of fact. *Dunn*, 689 S.E.2d at 265. The allegations at paragraphs 12, 14-17, 22 and 24 of the Complaint establish a *prima facie* case that the discovery rule applies.

---

[1] Indeed, the whole premise of Allstateôs argument on the triggering of the statute of limitation is contained on page 4 of its brief where it states ñit is clear . . . relating to the Adjuster Defendantsô handling of a claim arising from a 1988 accident ï that all the limitations periods would have run long ago.ò Further, Allstate states the Cumptans ñclearly knew or should have known that they had been injured and who supposedly caused that alleged injury when their claim was fully and finally settled for the ónon-stackedô UIM coverage amount of $100,000.00.ò Allstateôs Brief, pp. 5-6.

[2] Essentially, defendants offer this adverb in lieu of meeting their burden under Rule 12.

Step 3 – Determination of whether the discovery rule applies

ñThe ódiscovery ruleô is generally applicable to all torts, unless there is a clear statutory prohibition to its application.ò Syl. pt. 2, *Dunn*. Allstate has not demonstrated that a statutory bar exists to application of the discovery rule to any claim asserted by the Cumptans. Thus, the discovery rule may be applied to toll the running of the applicable statutes of limitation until such time as the Cumptans knew, or should have known by the exercise of reasonable diligence, that (1) they had been injured, (2) the identity of the entity who owed them a duty to act with due care and who may breached that duty, and (3) that the conduct of that entity has a causal relationship to their injury. Syl. pt. 4, *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). In syllabus point 4 of *Dunn*, the Court explained:

> Under the discovery rule set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.,* 199 W.Va. 706, 487 S.E.2d 901 (1997), whether a plaintiff ñknows ofò or ñdiscoveredò a cause of action is an objective test. The plaintiff is charged with knowledge of the factual, rather than the legal, basis for the action. This objective test focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action.

The relevant inquiry is when the Cumptans *objectively* had, or by the exercise of reasonable diligence, should have had knowledge that Allstate had acknowledged internally they were entitled to stacked coverage because its policy language was legally insufficient to preclude stacking of underinsured motorists coverage benefits and had acted inconsistently with that position in the handling of their claim. Those facts form the basis of the Cumptansô claims. Allstateés argument that the Cumptans are charged with knowing the law and, since they possessed a copy of their insurance policy, should have known it did not preclude stacking is misplaced and are yet another attempt to avoid its legal obligations. West Virginia law imposes a duty on insurers, like Allstate to disclose all applicable policy provisions to first-party claimants and not conceal pertinent policy provision. 114 W.Va.C.S.R. 14-4.1, -4.2. Under Allstateés argument, the Cumptans are also presumed to know this law and may not assume Allstate and its agents were acting in accordance with the law when handling their claim. Such a construction would render the protections of 114 W.Va. C.S.R. 14-4.1 and 114 W.Va. C.S.R. 14-4.2 meaningless.

The insurance industry is a highly regulated industry with specific, heightened duties due to the trust and confidence which policyholders must place in their insurers. While Allstate is correct that under *Hartley Hill Hunt Club v. County Commission of Richie County*, 220 W.Va. 382, 647, S.E.2d 818 (2007), all persons are presumed to know statutory law, West Virginia does not presume that insureds know the contents of their insurance policies. *Murray v. State Farm Fire and Cas. Co.*, 203 W.Va. 477, 491, 509 S.E.2d 1, 15 n. 14 (1998). Still less are they aware of their insurerés internal positions on the scope of policy coverage. To accept Allstateés argument requires that this Court presume that the Cumptans knew the contents of their policy, were able to interpret the language contained therein in light of West Virginia common law and knew that Allstate was violating its legal duty to disclose and not conceal pertinent policy provisions. Further, Allstateés argument that the Cumptans ñshould have knownò that their policy language was legally insufficient to preclude stacking under West Virginia common law is particularly specious is the face of Allstateôs statement in footnote five on page 8 of its brief that it ñdisputes that these cases required óstackingô under the circumstances of plaintiffsô case.ò Allstate cannot have it both ways. Allstate cannot be permitted to argue that the Cumptans should have known that their policy provisions were insufficient under West Virginia case law to preclude stacking of their underinsured motorist coverage in an effort to bar their claims herein on statute of limitation grounds *while at the same time disputing that those same cases* required stacking.

Allstateôs arguments notwithstanding, the relevant date for statute of limitation purposes is the date on which the Cumptans learned of the conspiracy between Allstate and the Adjuster defendants to illegally and fraudulently conceal Allstateôs internal position that its policy language was legally insufficient to preclude stacking of uninsured and underinsured motorist coverage benefits in an effort to deprive policyholders, like themselves, of their rightful benefits. It was not until the Cumptans learned of this conspiracy that they learned the defendants had violated West Virginia law in the handling of their claim for underinsured motorist benefits by actions including, but not limited to: (1) concealing the fact that Allstateôs internal position was that its policy language was legally insufficient to preclude stating of underinsured motorists limits; (2) concealing the fact that Allstate admitted in its claim file that the Cumptans were entitled to $300,000.00 in coverage; (3) concealing the fact that Allstate had represented (or misrepresented) to regulatory authorities that it permitted its policyholders to stack uninsured and underinsured policy limits; (4) actively representing that to the Cumptans that their policy of insurance precluded the stacking of underinsured motorist coverages; and (5) compelling the Cumptans to ñsettleò for ñpolicy limitsò of $50,000.00 when it knew that its internal position was that the policy limits were $300,000.00. To the extent that there is a dispute over when the Cumptans learned of Allstateôs violation of its internal position on stacking and its violation of West Virginia law by concealing that it knew its policy permitted stacking, that is a question of fact which must be resolved by the trier of fact. *See* syl. pt. 5. *Dunn*. Such a determination is patently ill-suited to a Rule 12, on the pleadings, analysis. *LaPosta Oldsmobile, Inc. v. General Motors Corp.*, 426 F.Supp.2d 346, 349 (N.D.W.Va. 2006) (noting that a Rule 12(b)(6) motion ñis not a procedure for resolving a contest about the facts.ò).

Step 4 - Determination of whether doctrine of fraudulent concealment applies

Even if the trier of fact determines that the Cumptans are not entitled to the benefit of the discovery rule, then the trier of fact must determined whether the doctrine of fraudulent concealment applies to toll the statute of limitation. ñWhenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitations is tolled.ò Syl. pt. 5, in part, *Dunn*. ñFraudulent concealment involves the concealment of facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud.ò *Dunn*, 689 S.E.2d at 264 (quoting *Trafalgar House Const. Inc. v. ZMM, Inc.*, 211 W.Va. 578, 584, 567 S.E.2d 294, 300 (2002)). That is the precise situation before this Court. Allstate had specific knowledge that the language in the Cumptansô policy was insufficient to preclude stacking under West Virginia law, a duty under West Virginia law to disclose to them that $300,000.00 was available to satisfy their claims under the terms of their policy and an intent to mislead the Cumptans and fraudulently deprive them of the full policy proceeds to which they were legally entitled. The fact concealed ï Allstateôs knowledge that stacking was required under the Cumptansô policy language, is the critical fact forming the basis of all of the Cumptansô claims. Upon discovery of that fact, the Cumptans learned that the Allstate had intentionally violated West Virginia law in the handling of their claim and unlawfully deprived them of their full policy benefits.

Allstate cites to several cases for the proposition that the doctrine of fraudulent concealment is inapplicable to toll the statute of limitation where the alleged fact concealed is the terms of a contract. Allstateôs argument in this regard is misplaced for two reasons. First, the argument oversimplifies the basis of the Cumptansô claims. Allstateôs argument conveniently omits that the Cumptans are alleging not only that Allstate and the Adjuster defendantôs fraudulently concealed the true terms of their policy, but also fraudulently concealed their knowledge that the policy required stacking and their actions in denying the same are inconsistent with Allstateôs representations to the West Virginia Insurance Commissioner. Secondly, the cases relied upon by Allstate are easily distinguishable.

For example, in *Skinner v. USAble Life Co.*, 200 F.Supp.2d 626 (S.D.Miss. 2001), the court noted that the plaintiffs were provided with the ñpolicies, certificates of insurance and brochures which clearly explained the method of disability paymentsò prior to or at the time they purchased the disability policies at issue. *Skinner,* 200 F.Supp.2d at 638. The court in *Skinner* noted that the defendant had ñpresented uncontroverted proof that [plaintiffs] had in their possession a certificate of insurance and a brochure which defined the scope of coverage and detailed deduction for óother incomeô at the time the disability policies were purchased[.]ò and found that the brochures were ñsufficiently clear concerning the policies to defeat any claim of fraudulent concealment.ò The essence of the claims asserted in *Skinner* was that the policy didnôt provide the benefits as they were represented to be at the time the policy was purchased. Here, Allstate has produced no evidence that the Cumptans were provided with any documentation which clearly indicated that their underinsured motorists coverages could be stacked contrary to the express representations of Allstate during the handling of their claim that stacking was prohibited under their policy. Although Allstate knew internally stacking was required, on the fact of the policy, the issue was far less clear.

Similarly, Allstateôs citation to the unreported opinion in *Raucci v. Roman*, 2008 WL

2622776 (D.Conn. July 26, 2008), actually contradicts its attempt to dismiss the Cumptansô claims upon a Rule 12(b)(6) motion. The court in *Raucci*, specifically noted that a statute of limitation defense ñgenerally requires a factual inquiry beyond the face of the complaint.ò *Raucci*, 2008 WL 2622776, *2. *Raucci* involved the sale of the plaintiffôs interests in certain corporations. The court found plaintiffôs argument that the defendant had fraudulently concealed contract terms from him was insufficient to invoke the doctrine of fraudulent concealment to toll the stature of limitation which, based on the face of the complaint would appear to bar the action, where the plaintiff actually signed the contract at issue and there was no allegation that the term was unknowable to him. Citation to a case regarding fraudulent concealment of a term of a negotiated business contract simply has not relevance to an insurance dispute. Insurance contracts are contracts of adhesion, not negotiated contracts. *Glen Falls Ins. Co. v. Smith*, 217 W.Va. 213, 225, 617 S.E.2d 760, 772 (2005) (ñinsurance contracts are usually contracts of adhesion where the insured is not in the position to negotiate the terms of the policy with the insurer.ò). Further, in ordinary business contracts, one party does not have a statutory duty to disclose contract terms to the other party. *See e.g.* W. Va. Code §33-11-4(9)(n); 114 W.Va. C.S.R. 14-4.1. *Raucci*, is inapplicable to the Cumptansô claims because: (1) the Cumptansô claim involves an insurance policy, not a corporate sale; (2) the Cumptans did not sign nor negotiate the terms of the Allstate policy; (3) Allstate was under a legal duty to accurately disclose the policy terms during the handling of the Cumptansô claim; and (4) the Cumptans have alleged that the Allstate concealed it they were acting inconsistently with internal Allstate policy.

Likewise, under *Sertz v. Gulf Oil Corp.*, 1988 WL 83188 (S.D. N.Y. July 22, 1988), another unpublished opinion relied upon by Allstate, the doctrine of fraudulent concealment is applicable ñwhere a defendant has fraudulently concealed the acts which have caused injury to the plaintiff or where the fraud which furnishes the basis of the action is self-concealing. *Sertz*, 1988 WL 83188, *3. Allstate and the Adjuster defendants conspired to misrepresent and conceal pertinent policy provisions, provisions which they were required to disclose under West Virginia law. As such, the fraudulent concealment of the fact causing the Cumptansô injury ï the conspiracy between Allstate and the Adjuster defendants to deny the Cumptans the ability to stack their underinsured motorist coverage in violation of Allstateô internal documentation that its policy provisions did not preclude stacking ï was self-concealing. There was absolutely no way for the Cumptans to learn of Allstateô and the Adjuster defendantsô misrepresentations and violations of West Virginia law until they learned of the conspiracy.

A factual inquiry regarding the extent of the conspiracy between Allstate and the Adjuster defendants to violate West Virginia law and deprive the Cumptans of their rightful policy benefits and when the Cumptans learned of the misconduct is necessary before it can be determined when the applicable statutes of limitation began to run. Accordingly, resolution of this issue is inappropriate until such time as the trier of fact has spoken.

Step 5 – Application of other tolling doctrines

Under *Dunn*, even if the trier of fact would determine that the Cumptans are not entitled to the benefit of the discovery rule or doctrine of fraudulent concealment, a determination of when the applicable statutes of limitation may expire cannot be made until such time as the trier of fact determines whether another tolling doctrine applies. Examples of other tolling doctrines include, the continuous representation doctrine, the continuous treatment doctrine and the continuous tort doctrine. *Dunn*, fn 7. The continuous tort doctrine is potentially applicable herein in light of Allstateô continued misconduct and concealment of applicable policy provisions. When the conspiracy to defraud policyholders, like the Cumptans, was first uncovered, Allstate could have attempted to make things right by going back and paying legitimate claims which it had previously denied but it did not. Instead, the conspiracy continued with respect to all previously denied claims. As such, the conspiracy to refuse to disclose pertinent policy provisions and to refuse to pay claims utilizing stacked coverage limits continues to this day. Because the misconduct continues, the running of the applicable statutes of limitation may not yet been triggered.

Application of the *Dunn* analysis makes clear that Allstateôs motion to dismiss on statute of limitation grounds is improper. Questions relating to when all elements of the Cumptansô causes of action occurred and whether the discovery rule, doctrine of fraudulent concealment and/or continuous tort doctrine apply all involve questions of fact inappropriate for resolution in a Rule 12(b)(6) motion. Further, to the extent any statute of limitation may be tolled as to the Adjuster defendants, it is also tolled as to Allstate. *Dunn*, 689 S.E.2d at 273 (ñThe general rule is that if the statute of limitation is tolled as to one defendant in a civil conspiracy, it is tolled as to all alleged co-conspirators.ò) Therefore, the Cumptans respectfully requests Allstateôs motion to dismiss on statute of limitation grounds be denied.

III. THE CUMPTANS’ UNJUST ENRICHMENT CLAIMS ARE LEGALLY COGNIZABLE AND SHOULD NOT BE DISMISSED ON A RULE 12(B)(6) MOTION

Allstateôs arguments regarding the Cumptansô unjust enrichment claims arise from a fundamental misconception of the claims being asserted. The Cumptans do not allege that Allstate was unjustly enriched by its violation of the insurance policy. Rather, the Cumptans alleges that Allstate was unjustly enriched through its violation of West Virginia law and fraudulent concealment of relevant facts to the Cumptansô detriment. Complaint, ¶ 21.

Allstateôs reliance upon *Bright v. QSP, Inc.*, 20 F.3d 1300, 1302 (4th Cir. 1994), *cert. denied*, 513 U.S. 875 (1994) and *Johnson v. Ross*, 2009 WL 4884374, *5 (S.D.W.Va. Dec. 10, 2009), for the proposition that an unjust enrichment claim fails when there is a contract expressly governing the subject matter is misplaced.[3] For example, *Bright* involved a plaintiffôs attempt to recover expenditures plaintiff incurred in performing the plaintiffôs own contractual obligations. *Bright v. QSP, Inc.*, 20 F.3d at 1302 (4th Cir. 1994) (ñThis case presents the question whether plaintiff-supplier may recover expenditures incurred in performing supply contracts with defendant-distributor by claiming that those expenditures unjustly enriched the defendant. Here it is clear that the expenditures benefitted the plaintiff by enhancing its own contractual performance, and that the defendant did not receive any benefits beyond the scope of its express agreements with the plaintiff.ò). Here, the Cumptans are not seeking to recover amounts incurred in performance of a contract which benefited Allstate. The Cumptans are seeking to recover amounts Allstate withheld from them in violation of West Virginia law.

Allstateôs reliance upon *Johnson*, is likewise misplaced because, in *Johnson*, the court noted that the plaintiff had actually pled a violation of the license agreement as the basis of its unjust enrichment claims. *Johnson*, 2009 WL 4884374 at *5. The Cumptans did not plead a pure breach of contract claim as the basis for his unjust enrichment claims. Instead, the Cumptans alleged that Allstateôs violation of West Virginia law by fraudulently concealing and actively misrepresenting policy provisions formed the basis of their unjust enrichment claims. Complaint, ¶ 21.

Thus, contrary to Allstateôs mischaracterization of this claim, the Cumptans are not alleging that Allstate was unjustly enriched because it breached its contractual obligations to pay stacked motorist coverages. The Cumptans are alleging that Allstate was unjustly enriched by its violation of West Virginia law regarding the disclosure of pertinent policy provisions. In *LaPosta Oldsmobile*, this Court rejected an argument that a claim for unjust enrichment fails as incompatible with plaintiffôs ñacknowledgement that an express contract governs the subject matter of the disputeò finding the express terms of the contract at issue did ñnot cover the identical subject matter alleged.ò *LaPosta Oldsmobile*, 426 F.Supp.2d at 356. Accordingly, this Court denied the defendantôs motion to dismiss finding the plaintiff may assert an unjust enrichment claim and the question of whether the defendant improperly received a benefit from the plaintiff was a question of fact. *Id.* Just as denial of the defendantôs motion to dismiss was appropriate in *LaPosta Oldsmobile*, denial of Allstateôs motion to dismiss the Cumptansô unjust enrichment claims is appropriate because the alleged unjust enrichment arises from Allstateôs violation of West Virginia law and fraudulent concealment of internal company policy regarding stacking of underinsured motorist coverages under its policies issued before December 16, 1991.

---

[3] The Cumptans acknowledge that Allstate cites to two out of jurisdiction, unpublished opinions in support of its argument. However, as there is applicable governing law from this jurisdiction, including this Court, The Cumptans will not devote attention to such non-persuasive opinions from other jurisdictions.

CONCLUSION

Allstate conspired with the Adjuster defendants to defraud the Cumptans and violate West Virginia law. To the extent there is any question as to whether the Cumptansô claims were timely filed, those questions are factual in nature and inappropriate for resolution in a motion to dismiss. Further, the Cumptansô unjust enrichment claims arise from Allstateôs illegal and fraudulent conduct, not its breach of policy provisions. WHEREFORE, for the reasons set forth above, plaintiffs Charles C. Cumptan and Deborah V. Cumptan respectfully request that Allstateôs motion to dismiss be denied.

Respectfully submitted,
CHARLES C. CUMPTAN and
DEBORAH V. CUMPTAN, Plaintiffs

By: _/s/ Michelle Marinacci________
CHRISTOPHER J. REGAN #8593
MICHELLE MARINCCI #7482
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
304-242-8410
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, Michelle Marinacci, Esquire, hereby certify that on this 27th day of October, 2010, I electronically filed the foregoing document *Plaintiffs' Memorandum in Opposition to Defendant Allstate Insurance Company's Motion to Dismiss* with the Clerk of Court using CM/ECF which will send notification of such filing to the following:

Walter M. Jones, Esq.
Michael M. Stevens, Esq.
Martin & Seibert, L.C.
1453 Winchester Avenue
Martinsburg, WV 25402
Counsel for Defendants

By: _/s/ Michelle Marinacci__________
CHRISTOPHER J. REGAN #8593
MICHELLE MARINCCI #7482
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
304-242-8410
Counsel for Plaintiff